

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CYNTHIA BALCER,

Plaintiff,

DECISION AND ORDER

11-CV-6320L

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

On June 29, 2011, plaintiff commenced the instant action, appealing the denial of her application for Social Security disability and supplemental security income benefits by the Commissioner of Social Security (the “Commissioner”). (Dkt. #1). On January 20, 2012, the Commissioner moved for judgment on the pleadings. (Dkt. #7).

On January 30, 2012, plaintiff’s counsel filed a suggestion of death upon the record, in the form of a motion to withdraw the complaint. The motion is supported by a copy of plaintiff’s death certificate, reporting that plaintiff died on January 4, 2012, and an affirmation signed by plaintiff’s husband, authorizing plaintiff’s counsel to discontinue the action. (Dkt. #9, #10).

Rule 25(a)(1) of the Federal Rules of Civil Procedure provides that:


[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent’s successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Fed. R. Civ. Proc. 25(a)(1).

Initially, I note that because no properly-supported motion for substitution has been made, plaintiff’s counsel and husband lack standing to pursue the present motion to withdraw the

complaint. The relief they seek, however, is granted as a matter of course pursuant to Fed. R. Civ. Proc. 25. Because no one has moved to be substituted for plaintiff in this action and more than ninety days have passed since the suggestion of death was filed and served, the complaint is hereby dismissed, with prejudice, pursuant to Fed. R. Civ. Proc. 25(a)(1). The pending motions to dismiss (#7) and to withdraw the complaint (Dkt. #9, #10) are denied as moot.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
October 23, 2012.